90-475

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

USDC-FL-MIA NO. 89-2292-CIV-KEHOE

USCA-11 NO. 90-5184

IN RE: ARTHUR FALKNER and
SYBLE FALKNER, his wife,

PETITIONERS, PRO SE.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ARTHUR FALKNER
SYBLE FALKNER
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred and abused its authority and discretion in dismissing the Petition for Writ of Mandamus properly brought before it pursuant to 28 USC Section 1651(a)?

2. Whether the Court of Appeals had authority or jurisdiction to affirm a district court's dismissal order not before it under the provisions of 28 USC Section 1291?

3. Whether the Court of Appeals erred in failing to consider and grant the Petition for Writ of Mandamus and to compel the Respondent Judge to comply with its mandatory duties under Rules 8(f), 11, 12(f), 16(b), and 56, Fed.R. Civ.P.?

4. Whether the Court of Appeals erred in failing to treat the order of dismissal as null and void?

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IN RE: ARTHUR FALKNER and
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, pro se ARTHUR FALKNER and SYBLE FALKNER, his wife, respectfully pray for a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on March 9, 1990.

OPINIONS BELOW

The Court of Appeals entered its unprinted Rule 36-1 Affirmance without Opinion dated March 9, 1990, under its Case No. 90-5184 that DISMISSED the Petition for Writ of Mandamus "as moot in light of the district court's ruling of February 27, 1990, dismissing plaintiffs' complaint. See note 1 of the district court's order." A copy of the memorandum is attached as Appendix A, infra., pp.17 . The Court DENIED petitioners' petition for rehearing on June 13, 1990, which order further GRANTED petitioners' Motion To Compel Docketing of the Petition for Rehearing and for a Ruling by the Court, and DENIED petitioners' Motion to Stay Issuance of Mandate and to Stay Appeal No. 90-5302. A copy of the order is attached as Appendix B, infra., pp.18 .

JURISDICTION

On March 9, 1990, the Court of

Appeals entered judgment affirming the granting of the defendants' motion to dismiss petitioners' verified complaint that in view thereof, note 1, thereon, DENIED as "moot," the petitioners' Motion to Strike Sham Defense and for Summary Judgment and for Related Relief under Rule 11, (Appendix A). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

Title 28 USC Sec. 1651(a):

> . . all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

Title 28 USC Sec. 1291:

> The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States . .

Rule 21(a), Fed.R.App.P.:

> Application for a writ of mandamus . . directed to a judge . . shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge . . and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

Rule 36-1, Court of Appeals Rules, Eleventh Circuit:

> When the court determines that any of the following circumstances exist: (a) judgment of the district court is based on findings of fact that are not clearly erroneous; . . (b) judgment has been entered without an error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

STATEMENT OF THE CASE

Petitioners, pro se, plaintiffs, pro se below, on October 12, 1989, filed their verified complaint with its certified exhibits A thru M attached, against a THRIFT and a LAW FIRM, arising under the Constitution, 5th, 7th, and 14th Amendments, and Laws of the United States and Sections 1983, 1985 and 1986, and Title 42, of the United States Code, with jurisdiction under Title 28, USC Sections 1331, 1343, 2201, 2202 and 2283 and requested trial by jury. Notwithstanding that this case took the form of a tort claim for damages, its essential and necessary nature is an equitable proceeding collaterally attacking, among other things, that certain restitution action of Falkner v AmeriFirst Federal Savings and Loan Association (Fla 11th Judicial Circuit Case No. 83-8117-CA-28, and the Final Summary Judgment entered

in 1988 therein in favor of AmeriFirst Bank as null and void for want of jurisdiction of the state court to render same based upon fraud of the defendants in collusion with each other and with State Court officials, under color of law, and for non-compliance with constitutional due process and statutory requirements that denied petitioners' rights to introduce evidence or otherwise make an effective claim or defense relating to petitioners' liberty and property rights, or have a jury trial as ordered, and relied upon "void" judgments.

Pursuant to the provisions of Rule 8(b),(c), Fed.R.Civ.P. defendants LAW FIRM filed a joint response with the THRIFT, containing general denial, and affirmative defenses, with a Rule 11 motion, with nothing in support.

Petitioners timely filed their

Motion To Strike Sham Defense; And For Summary Judgment; And For Related Relief Under Rule 11, with supporting Affidavit and certified copies of the state court transcripts of proceedings on Summary Judgment hearings, etc., and requested an evidentiary hearing and oral argument thereon, pursuant to local rule 10(b)(1) of the district court. The defendants did not respond as required under Rule 56(e), Fed.R.Civ.P. Petitioners timely filed their Notice of Pendency on their said Rule 11, 12(f) and 56 motions, pursuant to local Rule 10(b)(3) of the district court, and on February 14, 1990, mailed their Notice of 90 Day Expiration on said motion and Request To Set Hearing thereon.

Petitioners mailed their Petition for Writ of Mandamus on February

20, 1990, pursuant to and in compliance with Title 28 USC Section 1651(a), Fed.R.App.P., to compel HONORABLE JAMES W. KEHOE, U.S. District Judge, Southern District of Florida, Miami Division, Respondent, to comply with Rules 11, 12(f), 16(b) and 56, Fed.R. Civ.P.

The Court of Appeals, without cause, refused to file the Petition on February 22, 1990, and to assign it to the general docket as required under Rule 21(a), Fed.R.App.P., and Rule 21-1, Court of Appeals Rules, Eleventh Circuit, and withheld its filing until March 1, 1990, under it's receipt No. 12639.

On February 27, 1990, the District Court entered it's order dismissing the complaint under Rule 12(b)(6), Fed.R. Civ.P., and by its note 1, thereon stated: In view of the Court's ruling

herein, the Plaintiffs' Motion to Strike Sham Defense and for Summary Judgment and for Related Relief Under Rule 11, is denied as MOOT. A copy of the order is attached as Appendix C, infra., pp.19-20.

The Court of Appeals ignored its statutory responsibility under Title 28 USC Section 1651(a), to take the petition as it came to it and to accept petitioners' petition as true and to rule upon its merits. On March 9, 1990, the Court of Appeals left the record and entered its Rule 36-1, Court of Appeals Rules, Eleventh Circuit "affirmance without opinion" order stating: "The Petition for Writ of Mandamus is DISMISSED as moot in light of the district court's ruling of February 27, 1990, dismissing plaintiffs' complaint. See note 1 of the district court's order," without

jurisdiction of the February 27, 1990 order of dismissal, which order was not properly before it under the provisions of 28 USC Section 1651(1), as required, and not dependent upon 28 USC Section 1291.

The Court of Appeals ignored petitioners' supplemental petition for writ of mandamus therein of March 8, 1990, to vacate, set aside and reverse the dismissal order and compel respondent JAMES W. KEHOE, JUDGE, to exercise the powers with which the constitution and laws have clothed it. Petitioners' timely Petition for Re-hearing of March 20, 1990, was DENIED on June 13, 1990.

REASONS FOR GRANTING THE WRIT

Congress provided clear guidelines for the limited jurisdictional power of the Circuit Courts of Appeal. Petitioners' application for a Writ

of Mandamus, as provided under 28 USC Section 1651(a), empowered the Court of Appeals to either grant or deny the petition, but not to simply ignore it and dismiss it as "moot," in violation of the Federal Rules of Procedure. Further, 28 USC Section 1291, is clear that its jurisdictional grant is limited to appeals from final decisions of the district courts of the U.S. The February 27, 1990 decision of respondent JUDGE KEHOE, was not before the Court of Appeals for its consideration and on its face was not final and the Court of Appeals was therefore prohibited from affirming it.

The District Court and the Court of Appeals properly acquired jurisdiction and it was its duty to determine the controversy and fully perform and exhaust its jurisdiction and decide every issue or question presented.

The judicial power and jurisdiction given to courts under the Constitution is not delegable and cannot be abdicated in whole or in part. Questions raised in the pleadings however delicate in nature, must be passed on by the courts and a court cannot refuse to exercise the power with which the Constitution and Laws have clothed it, as in this case at bar.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in this matter and so far sanctioned such a departure by the lower court, as to call for an exercise of the Supreme Court's power of supervision in determining this writ. Further, examination of the validity and construction of the Rules of Civil Procedure affords a basis for granting this writ. Societe Internationale Pour Participations

Industrielles & Commerciales, S.A. v. Rogers, 357 US 197, 2 L Ed2d 1255, 78 S Ct 1087; Sears, Roebuck & Co. v Mackey, 351 US 427, 100 L Ed 1297, 76 S Ct 895. Likewise, the writ should be granted to determine important questions of judicial administration pertaining to the exercise of federal equity jurisdiction. Russell v Todd, 309 US 280, 84 L Ed 754, 60 S Ct 527; Sprague v Ticonic Nat. Bank, 307 US 161, 83 L Ed 1184, 59 S Ct 777.

Further, it is sufficient reason for granting certiorari that the case was tried and disposed of by a court of appeals not organized in conformity to law, William Cramp & Sons Ship & Engine Bldg. Co. v International Curtis Marine Turbine Co., 228 US 645, 57 L Ed 1003, 33 S Ct 722, or that such court based its decision on a point not presented or argued by the litigants,

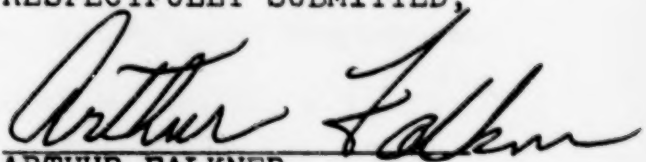
which petitioners had never had an opportunity to meet by the production of evidence. Letulle v Scofield, 308 US 415, 84 L Ed 355, 60 S Ct 313. In addition, when charges that a court of appeals has invaded its duly conferred jurisdiction so that its statutory duties cannot be effectively fulfilled, the Supreme Court will grant certiorari. National Labor Relations Board v Waterman S.S. Corp. 309 US 206, 84 L Ed 704, 60 S Ct 493.

CONCLUSION

For the reasons set forth above, and in the interest of substantial justice, petitioners, pro se, ARTHUR FALKNER and SYBLE FALKNER, his wife, respectfully request that a writ of certiorari be granted in all respects to review the judgment, or the affirmance without opinion of the United States Court of Appeals for

the Eleventh Circuit.

RESPECTFULLY SUBMITTED,



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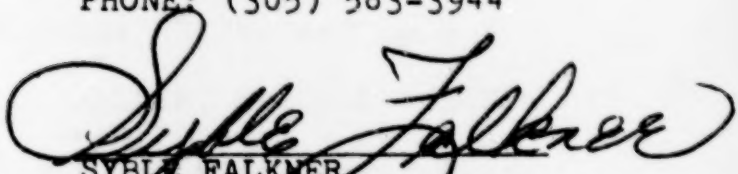

SYBLE FALKNER
PETITIONER, PRO SE
4671 S.W. 42ND AVENUE
FORT LAUDERDALE,
FLORIDA 33314
PHONE: (305) 583-3944

DATED: September 6, 1990.

AFFIDAVIT OF SERVICE

STATE OF FLORIDA)
ss.:
COUNTY OF BROWARD)

ARTHUR FALKNER, after being duly sworn, deposes and says that pursuant to Rule 28.3 of this Court, he served three copies of the within PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS FOR THE ELEVENTH

CIRCUIT, by U.S. Mail, this 6th day of September, 1990, upon Respondent HONORABLE JAMES W. KEHOE, U.S. District Judge, Southern District of Florida, Federal Courthouse, Chambers, 301 N. Miami Avenue, Miami, Florida 33128; and upon BLACKWELL, WALKER, FASCELL & HOEHL, ESQS., & BLACKWELL WALKER, P.A., attorney for itself and defendant THRIFT, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131.

ARTHUR FALKNER, Affiant
PETITIONER, PRO SE
4671 S.W. 42nd Avenue
Fort Lauderdale,
Florida 33314
Phone: (305) 583-3944

Subscribed and sworn to before me this 6th day of September, 1990.

NOTARY PUBLIC in and for said County and State
MY COMMISSION EXPIRES:

NOTARY PUBLIC, STATE OF FLORIDA.
MY COMMISSION EXPIRES: JULY 13, 1993.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.

IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-5184

IN RE: ARTHUR FALKNER and
SYBLE FALKNER,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

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Before: ANDERSON, CLARK and
EDMONDSON, Circuit Judges.

BY THE COURT:

The Petition for Writ of Mandamus is DISMISSED as moot in light of the district court's ruling of February 27, 1990, dismissing plaintiffs' complaint. See note 1 of the district court's order.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAR 9 1990

MIGUEL J CORTEZ, CLERK

APPENDIX A

IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-5184

IN RE: ARTHUR FALKNER and
SYBLE FALKNER,

Petitioners.

On Petition for Writ of Mandamus
to the United States District
Court for the Southern District
of Florida

Before: ANDERSON, CLARK and
EDMONDSON, Circuit Judges.

BY THE COURT:

The Motion to Compel Docketing of the Petition for Rehearing and for a Ruling by the Court is GRANTED. The Motion to Stay Issuance of Mandate is DENIED. The Motion to Stay Appeal No. 90-5302 is DENIED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JUN 13 1990

MIGUEL J. CORTEZ, CLERK

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 89-2292-CIV-KEHOE

ARTHUR FALKNER, et ux.,

Plaintiffs,

vs.

AMERIFIRST BANK, etc, et al,

Defendants.

/

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)(6)

THIS CAUSE is before the Court upon the motion of the Defendants, pursuant to Federal Rules of Civil Procedure 11 and 12(b)(6), to dismiss or strike the Complaint herein.

After a review of the motion, it is

ORDERED and ADJUDGED that the motion to dismiss is GRANTED. See Southern Jam, Inc. v Robinson, 675 F. 2d 94 (5th Cir. 1982). See also Van Sickle v Holloway, 791 F.2d 1431 (10 th Cir. 1986). Earnest v Lowentritt, 690 F.2d 1198 (5th Cir. 1982). 1

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of February, 1990.

/S/ JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

Copies furnished to: Daniel J Kissane, Esq. Arthur Falkner, Pro Se

1 In view of the Court's ruling

APPENDIX C (pg 1 of 2)

herein, the Plaintiffs' Motion to Strike Sham Defense and for Summary Judgment, Etc., is denied as MOOT.

FILED BY_____D.C.

FEB 27 1990

CLERK, U.S. DIST. CT.